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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 203

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC. AND STATE OF NEW JERSEY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

**REPLY BRIEF FOR APPELLANT
ELI LILLY AND COMPANY.**

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**REPLY BRIEF FOR APPELLANT
ELI LILLY AND COMPANY.**

The concessions made in appellees' briefs, expressly and by not attempting to deal with points advanced by appellant, leave clear the unconstitutionality of the New Jersey statute as here applied. As to their contention that appellant is engaged partly in intrastate commerce, appellees now concede that they have raised a new point on this appeal but seek to justify it on a basis ruled out by decisions of this Court. In addition they make no attempt to refute appellant's showing that factual differences, and subsequent decisions of this Court render inapplicable the *Cheney* case, on which appellees place sole reliance. Their

concession that a state may not bar a suit arising out of interstate commerce in itself calls for reversal here since the present fair trade suit is clearly of that character.

On the question whether a state can constitutionally apply its qualification statute to a foreign corporation engaged only in interstate commerce appellees cite not a single decision which has ever so held. Long standing decisions to the contrary cited by appellant are neither differentiated, claimed to have been overruled, nor requested to be overruled. Appellees have neither shown that the state has the power it here asserts nor refuted appellant's showing that the statute burdens interstate commerce without serving any real state purpose.

ARGUMENT.

I.

Appellees' Contention that Appellant is Engaged Partly in Intrastate Commerce is Insupportable.

- A. The contention that appellant does intrastate business in New Jersey raises a new question on appeal and need not be considered.

Appellees do not deny that their intrastate commerce contention is a new one not raised below. Intervenor makes no attempt to justify it. Appellee Sav-On seeks to excuse it on the ground that the Court "is free to affirm a judgment upon any ground which has support in the record" (Br. p. 7); but all the cases it cites are cases coming from the federal courts and therefore inapplicable, as pointed out in *Blair v. Oesterlein Mach. Co.*, 275 U. S. 220, 225 (1927). In the *Blair* case, in declining to consider a new

argument raised on appeal, the Court stated the rule as follows:

"It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here."

B. Appellant's promotional activities in New Jersey are part of its interstate business.

Both appellees concede that appellant is engaged in interstate commerce in New Jersey, but they would artificially sever from that commerce appellant's activities in the state designed to promote the sale of its goods in interstate commerce. This unrealistic position is based entirely upon the fact that appellant's detail men engage in promotional activities at the retail level whereas appellant sells directly only to wholesalers.

Advertising and promotion by an exclusively interstate seller are inseparable from the interstate business. Building consumer demand and persuading retail dealers to carry the manufacturer's products on their shelves are prerequisites to the movement of goods from the factories

* The rule of the *Blair* case was reaffirmed in a later case holding that the Court will not entertain a new argument on appeal in support of the judgment of a state court. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940). To the same effect are *Virginian Ry. v. Mullens*, 271 U. S. 220, 227-28 (1926) and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). See also ROBERTSON & KIRKHAM: JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §61 (1951 ed.). The five cases cited by appellees are distinguishable also in other respects. In three of them the contention raised on appeal had been advanced below but rejected. *Jaffke v. Dunham*, 352 U. S. 280 (1957); *Langnes v. Green*, 282 U. S. 531 (1931); *United States v. American Railway Express Co.*, 265 U. S. 425 (1924). In the fourth case the Court rejected an attempt by the respondent to attack a judgment as to which he had not sought review. *LeTulle v. Scofield*, 308 U. S. 415 (1940). The fifth case was a tax case in which the basic issue, the existence of a tax deficiency, had been raised below. *Helvering v. Gorran*, 302 U. S. 238 (1937).

into the stream of commerce. Virtually every interstate corporation engages in advertising and promotion of one kind or another. In the ethical drug industry of which appellant is a part, detail men are the accepted means of informing physicians, hospitals and druggists about drug products, since they are not sold or advertised directly to the consuming public. See *Hoffmann-LaRoche Inc. v. Schwegmann Bros. Giant Super Markets*, 122 F. Supp. 781, 782-83 (E. D. La. 1954).

The concept of isolating promotional activity from the interstate sales promoted is so artificial that even intervenor, inadvertently perhaps but significantly, describes appellant in its "Counter-Question Presented" as "a foreign corporation engaged in extensive local activity as part of its interstate commerce" (Br., p. 1). Intervenor also refers to the "ambit of the statute" as including regulation of "that part of interstate businesses carried on locally" (Br., p. 7). Obviously, all interstate business has to be carried on in one state or another. Local activity is necessary to carry on interstate as well as intrastate business.

The argument that promotion of interstate sales constitutes intrastate business was rejected in the original "drummer case"—*Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (1887). Refusing to hold that solicitation is local activity distinct from interstate sales, the Court pointed out that a manufacturer can not be expected to "sit still in his factory or warehouse, and wait for the people of those states to come to him. This would be a silly and ruinous proceeding" (120 U. S. at 494-95). An argument that promotional activities were separable from the interstate commerce promoted was also found deficient in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939). There a Washington tax had been upheld by the

state court on the theory that, although the taxpayer's shipments of fruit were interstate, its activity in Washington in "promoting the commerce" was a local business. This Court reversed, pointing out that the promotional activity was in aid of the interstate sales.

Advertising at the consumer level by an interstate seller was held to be an integral part of interstate commerce in *Ford Motor Co. v. FTC*, 120 F. 2d 175 (6th Cir. 1941), *cert. den.* 314 U. S. 668. In rejecting an argument to the contrary based on the fact that the advertising related to "purely intrastate transactions"—sales by local dealers to the public—the Court of Appeals said:

"The use of advertising as an aid to the production and distribution of goods has been recognized so long as to require only passing notice. The economy of mass production is just as well known and the effects of advertising may be described as mass selling without which distribution would be lessened and a fortiori production correspondingly decreased. The present advertisement of the method for financing the purchase of petitioner's cars on credit was an integral part of their production and distribution" (120 F. 2d at 183).

In *Progress Tailoring Co. v. FTC*, 153 F. 2d 103 (7th Cir. 1946) the Commission had issued a cease and desist order against false advertising designed to solicit salesmen for an interstate seller. In affirming the order and rejecting the contention that the advertisements were detached from interstate sales, the Court of Appeals said:

"The advertisements are a part of the preliminary negotiations leading up to a sale in interstate commerce. They cannot be separated from the final sale, and are themselves a part of interstate commerce" (153 F. 2d at 105).

Appellant is aware of no qualification case, and appellees have cited none, holding that promotional activities require an interstate seller to comply with a state qualification statute. On the contrary the courts have consistently held in such cases that promotional activities, including those at the retail level by interstate sellers to wholesalers, are part of interstate commerce. *Weta Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cas. par. 69,639 (Minn. Dist. Ct.); *Remington Arms Co. v. Lechmère Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cas. par. 69,195 (R. I. Super. Ct.); *Waggener Paint Co. v. Paint Distributors, Inc.*, 228 F. 2d 111 (5th Cir. 1955); *State v. Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946); *Victor Talking Mach. Co. v. Lucker*, 128 Minn. 171, 150 N. W. 790 (1915); and *Maury-Cole Co. v. Lockhart Grocery Co.*, 173 S. W. 262 (Tex. Civ. App. 1915).

This recognition of promotional activities as a part of interstate commerce is only an application of the general principle that local activities cannot be regarded as separable from interstate commerce unless they constitute local business transactions economically distinct from interstate sales. Compare *Yark Mfg. Co. v. Colley*, 247 U. S. 21 (1918) and *Dozier v. Alabama*, 218 U. S. 124 (1910) with *General Railway Signal Co. v. Virginia*, 246 U. S. 500 (1918) and *Dalton Adding Machine Co. v. Virginia*, 246 U. S. 498 (1918); see *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 468 (1959). If, in addition to its interstate sales, the corporation engages locally in commercial transactions which are separately remunerative, the local activity can be regarded as separable from interstate commerce, but advertising, promotion, and solicitation of orders by an interstate seller are not transactions that produce income or

economic benefit apart from the interstate sales to which they contribute.

The only case cited by appellees in support of their contention is *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147 (1918). Appellant has shown in its main brief (pp. 29-31) the sharp contrast between *Cheney* and the present case. Not only did *Cheney* involve a different question—taxation rather than qualification—but the facts were markedly different. There the corporation had qualified to do a local business and maintained a stock of goods and a general business office in the state where orders were accepted. In addition, the major part of its business was found to be that of furnishing salesmen to act as agents of local wholesalers in the regular solicitation of orders from local retailers.

The *Cheney* case must be regarded as having been limited by *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959). Appellees have chosen to remain silent about that case, and the Act of Congress which followed it, although the important bearing of both was discussed in appellant's main brief (p. 31).

In sum, appellant's only business, and the sole source from which it derives any revenue or economic benefit, is the interstate sale of ethical drugs. Its promotional activities directed at stimulating demand for those drugs has no purpose or significance apart from the interstate sales.

C. The present suit arises from interstate commerce and cannot be barred.

Appellees have not rebutted appellant's contention that even if it were doing some intrastate business in New Jersey the decision below would have to be reversed.

It is expressly conceded by intervenor (Br. p. 10) and apparently by appellee Sav-On as well (Br. p. 9) that

even though a foreign corporation does some intrastate business, a state cannot bar a suit relating to its interstate business. *Furst v. Brewster*, 282 U. S. 493 (1931) is a clear holding to this effect.*

Having made this concession, appellees proceed to argue that the present suit does not arise out of interstate commerce because it is a suit for fair trade enforcement. This argument does not stand analysis. That fair trade enforcement by an interstate seller is part of the interstate marketing arrangement was established by *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951). Many state courts, including the highest court of New Jersey, have reached the same conclusion.** Indeed the New Jersey decision on the point, *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403 (1953), following the *Schwegmann* case, vacated state court injunctions granted in the earlier

* Appellee Sav-On is mistaken in saying that the corporation in the *Furst* case was engaged exclusively in interstate commerce. The state court found that the foreign corporation was engaged in intrastate commerce through its agent Brewster who made local sales. This Court held that even if Brewster was the agent of the corporation in making intrastate sales, the contract between Brewster and the foreign corporation was an interstate transaction and enforceable despite the corporation's failure to qualify (282 U. S. at 496-97).

Appellee also misinterprets a statement made in appellant's Jurisdictional Statement concerning the validity of qualification statutes as applied to intrastate commerce (Br. 5). The point is that qualification statutes are valid if applied solely to intrastate commerce, but not when applied to interstate commerce as well as intrastate. *Crutcher v. Kentucky*, 141 U. S. 47 (1891).

** *Johnson & Johnson v. Weissbard*, 11 N. J. 552, 95 A. 2d 403 (1953); *Remington Arms Co. v. Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Mass. 1959); *Weco Products Co. v. G. E. M., Inc.*, 1960 CCH Trade Cas. par. 69,639 (Minn. Dist. Ct.); *Seagram Distillers Co. v. Corenswet*, 198 Tenn. 644, 281 S. W. 2d 657 (1955); *Fromm & Sichel, Inc. v. Zimmerman*, 1956 CCH Trade Cas. par. 68,362 (D. Ill.); *Johnson & Johnson v. Narragansett Wiping Supply Co.*, 1958 CCH Trade Cas. par. 69,195 (R. I. Super. Ct.).

New Jersey case relied on by the appellees here, *Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585, 191 A. 873 (Ct. Err. & App. 1937). In the later *Johnson & Johnson* decision, in holding that the fair trade program of an interstate seller was part of interstate commerce, the Supreme Court of New Jersey said (11 N. J. at 557-58, 95 A. 2d at 406):

"The sales to the consumer on the local level are of the very essence of the interstate process. The retail market is the outlet for goods distributed in interstate commerce under a uniform price formula designed, as just said, to afford nationwide protection of plaintiff's good will. There is no discernible line of separation between the interstate and the intrastate operation. It is an integrated whole."

Even before the *Schwegmann* decision this Court had recognized that the aim of the fair trade laws is "to protect the property—namely, the good will—of the producer, which he still owns." *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193 (1936). Since appellant sells nothing except in interstate commerce, there is no other commerce to which the value of its good will can attach and no other commerce which a suit to preserve that good will can protect. The Commerce Clause safeguards appellant's right to protect the value and good will of its products moving in interstate commerce just as fully as it safeguards the right to sue for the purchase price after sale.

Intervenor's argument (Br. p. 8) that fair trade enforcement in itself constitutes intrastate activity, justifying the application of the New Jersey qualification statute, is at odds with this Court's decision in *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914) that resort to state courts for enforcement of rights arising from interstate commerce cannot be

barred by a qualification statute. The fact that appellant's suit invokes a state statute is irrelevant. Suits to enforce contracts made within the state for the sale of goods in interstate commerce, such as were involved in the *Sioux* and *Furst* cases, are also based on state law; there is no federal law that gives a cause of action for the breach of such a contract. Yet in both these cases this Court held that the state could not constitutionally bar the suit under its qualification statute.* What is important is not who creates the right but the relation of its enforcement to interstate commerce.

Intervenor's reliance on the McGuire Act (Br. p. 9) is difficult to understand; the very fact that it was necessary after the *Schwegmann* decision for Congress to enact the McGuire Act to make state fair trade laws effective identifies fair trade enforcement with interstate commerce.

II.

The New Jersey Qualification Statute as Applied Here Is Unconstitutional.

A. Appellees have not met the basic question of state power.

Conspicuously absent from appellees' briefs is any discussion of appellant's position that the qualification statute as here applied imposes a regulation fundamentally beyond the power of the state. They make no mention of *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951) which reaffirmed the principle that a state may not tax the privilege of engaging in interstate commerce, whatever may be

* The same result was reached in *Buck Stove Co. v. Vickers*, 226 U. S. 205 (1912) where the suit to set aside a fraudulent conveyance obviously sought enforcement of a state-created right.

the amount or computation of the tax.* The *Spector* case pointed out that this principle "gives lateral support to one of the cornerstones of our constitutional law. *M'Culloch v. Maryland*" (340 U. S. at 610). This comparison to the immunity of federal instrumentalities brings into sharp focus the total absence of state legislative power over the right to engage in interstate commerce.

As recently as the *Portland Cement* case the Court reiterated that it "has consistently held that the 'privilege' of engaging in interstate commerce cannot be granted or withheld by a state" (358 U. S. at 464). Intervenor's argument (Br. pp. 6, 11) that the New Jersey qualification statute is not a licensing provision purporting to grant the privilege of doing business in New Jersey flies in the face of the New Jersey decisions and the statute itself. By judicial decision the statute has been characterized as one granting a "license". *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 415, 60 Atl. 822, 829 (Ch. 1905). The statute itself provides that the corporation "may surrender the rights, privileges and franchises conferred upon it" by the certificate of authority. N. J. REV. STAT. 14:15-7. This places the statute in square conflict with the constitutional rule which has been the basis for invalidating every qualification statute that has ever come before this Court when applied to interstate commerce.

Appellant's main brief (p. 9) demonstrated the applicability of *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910). Appellees still have no answer to that case except to repeat the statement that it involved a Kansas qualifi-

* The *Spector* case followed *Freeman v. Hewit*, 329 U. S. 249 (1946), which held that where a tax amounts to a levy on the very process of interstate commerce it is invalid even though non-discriminatory, even though the same result could be accomplished by other means, and even though its deterrent effect on interstate commerce is not precisely calculable.

cation statute more onerous than New Jersey's. They simply ignore *International Textbook Co. v. Peterson*, 218 U. S. 664 (1910), cited in appellant's main brief (p. 10), which invalidated a Wisconsin qualification statute less onerous than the New Jersey statute.

At pages 14 and 15 of appellant's main brief it was shown that this Court and all states other than New Jersey have recognized that qualification statutes, regardless of their particular provisions, cannot be applied to interstate commerce.* The decision in *Union Brokerage Co. v. Jensen*, 322 U. S. 202 (1944), on which appellees so heavily rely, is no exception. Appellees devote pages to long quotations from the *Union Brokerage* case but never once come to grips with the central distinguishing feature of the case. It involved a corporation which had nothing to do with actual importation or exportation of goods and carried out all of its business transactions entirely within the confines of Minnesota.

In their effort to assimilate the present case to the entirely different line of cases sustaining police power regulation of essentially local matters, appellees cite no case not already dealt with in appellant's main brief except for *Duckworth v. Arkansas*, 314 U. S. 390 (1941). That case dealt with state regulation of traffic in intoxicating liquors—police regulation in the strictest sense. Control of dangerous commodities entering the state has always been recognized as a proper subject of state regulation. See *Crutcher v. Kentucky*, 141 U. S. 47, 61 (1891).

* See also Model Business Corporation Act §99 ¶2(i) (1960 ed.) which embodies this principle and has been enacted in numerous states.

B. Appellees have shown no state need to extend the qualification statute to foreign corporations in interstate commerce.

Appellant's main brief (p. 21) cites *Israel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905) as an authoritative determination that the purpose of the New Jersey qualification statute was to make possible the obtaining of state court jurisdiction over foreign corporations in suits against them. Appellant also pointed out, and neither appellee has disputed, that the qualification statute is no longer needed for this purpose.

In the face of this admitted statutory obsolescence, appellees have been hard pressed to find a state need to justify extending the qualification statute to corporations in interstate commerce. In the court below intervenor devoted its entire brief to the proposition that the function of the qualification statute was to implement the New Jersey Corporation Business Tax by apprising the state of the presence of foreign corporations for tax purposes. It cited no judicial or legislative determination that the statute had any such purpose, and the New Jersey Supreme Court did not adopt its contention.

On the present appeal counsel for intervenor has laboriously contrived a new purpose for the statute as "a regulation of local activity, designed to insure that the laws will be observed and if not, that there will be a presence of corporate responsibility within the state" (Br., p. 12). Again intervenor makes no claim of support for its contention in New Jersey decisions.

The nature and purpose of the statute is a matter for determination by the legislature and courts of New Jersey, not by briefs of counsel. *Sprout v. South Bend*, 277 U. S. 163, 169-70 (1928). But in any event it is difficult to fathom how

the qualification statute can "insure that the laws will be observed." Intervenor can hardly be serious in suggesting (p. 15) that the qualification statute "insures freedom" from gaming establishments and bootleggers. Few enterprises organized for crime would bother to incorporate, and if they did they would hardly reveal their illicit purpose in the papers filed with the Secretary of State. Nor would a criminal enterprise let the qualification statute, as distinguished from the state's criminal laws, deter it.*

Intervenor's brief (p. 15) divides the types of business from which the statute is claimed to "insure freedom" into those which are illegal and those which are lawful but subject to licensing. The only illegal type mentioned is "gaming establishments", obviously a local not an interstate business. The types cited as lawful but subject to licensing are insurance, banking and liquor, but all these are covered by licensing statutes separate and apart from the qualification statute.** Intervenor's argument as to the desirability of such licensing, which would not be affected in the slightest by a reversal here, supplies no reason for extending the qualification statute to interstate commerce.

Intervenor makes the equally farfetched suggestion that the statute protects New Jersey citizens against *ultra vires* corporate transactions (Br. pp. 15-16). Quite apart from any qualification statute, persons dealing with a foreign corporation can obtain the corporate charter from the corporation itself or the state of incorporation. The idea that

* Pursuing its idea to absurdity, intervenor says (p. 15) that but for the qualification statute "a business association might conduct its affairs, through subterfuge, in the guise of a corporation, and thus enjoy the legitimate benefits accruing to a corporation without in fact being one." Obviously if a "business association" is not really a corporation the qualification statute does not apply to it at all.

** N. J. Rev. Stat. 17:32-1,2 (insurance); N. J. Rev. Stat. 17:9A-316,318 (banking); N. J. Rev. Stat. 33:1-2 (liquor).

unless the qualification statute is applied to interstate business New Jersey citizens are at the mercy of foreign corporations, and forced to enter into transactions with them without ascertaining their powers, is fanciful.

There is a curious contradiction in intervenor's concept of the qualification statute. It first states (p. 11) that once the foreign corporation has filed the required statement the statute makes it mandatory upon the Secretary of State to issue a certificate of authority to transact business. Evidently intervenor considers this important to its argument that the statute is not a discretionary licensing provision. Then, in the same paragraph, apparently considering it equally important to show that the statute serves some purpose, intervenor proceeds to stress the responsibility placed upon the Secretary of State to decide whether the purposes of the corporation and its charter warrant issuance of the certificate of authority.

The informational purpose now advanced by intervenor as justification for the New Jersey statute would have been just as applicable to the qualification statutes held unconstitutional in the *Pigg*, *Peterson* and *Furst* cases. Indeed, once again taking refuge in a contradictory argument, intervenor's brief (p. 24) seeks to differentiate the statute involved in *Furst* on the ground that it required the corporation to supply information concerning its assets and liabilities and the amount of capital employed in the state. One would suppose that if information were the justifying consideration the *Furst* statute would have survived the constitutional test.

Although for 50 years the states have not been able to apply qualification statutes to corporations engaged in interstate commerce, there is no claim or showing that local interests have suffered. Significantly, there appears to be no reported decision in which the Attorney General of New

Jersey has invoked the provision of the statute authorizing a penalty against a foreign corporation doing business without a license. The only real purpose the statute now serves is to provide a convenient defense by which defendants, such as the appellee, can avoid their legal responsibilities.

C. Compliance with the qualification statute would burden interstate business.

Nothing in appellees' briefs refutes appellant's demonstration of the burdensome aspects of compliance with the New Jersey qualification statute. As pointed out in appellant's main brief (p. 24), by giving a general consent to suit through appointment of an agent for service of process a foreign corporation would subject itself to suits which otherwise might not be permissible under the "minimum contacts" rule or the Commerce Clause. Intervenor makes no attempt to meet this argument. Appellee Sav-On argues that a foreign corporation would not be estopped from objecting to such an assertion of jurisdiction after complying with the qualification statute, but this Court has held to the contrary. In *Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U. S. 213, 215-16 (1921), the Court, in an opinion by Mr. Justice Holmes, held that a foreign corporation which appoints an agent in compliance with a qualification statute "takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court."

* The decisions of this Court cited by appellee Sav-On (Br., p. 24) for its no-estoppel argument are not applicable. They hold merely that a corporation does not by qualifying impliedly assent to other state statutes which deny it equal protection of the laws. They do not deal with the scope of a corporation's consent to jurisdiction through appointment of an agent for service of process.

In New Jersey this risk is not merely speculative. Its courts have held that service on an agent appointed pursuant to the qualification statute provides jurisdiction over a foreign corporation in a suit by a non-resident on a cause of action arising outside the state. *Quigley Co. v. Asbestos Limited*, 134 N. J. Eq. 312, 35 A. 2d 432 (Ch. 1944). Thus compliance with the New Jersey qualification statute subjects foreign corporations in interstate commerce to suits to which they cannot object on due process or Commerce Clause grounds.

Appellees also fail to meet appellant's contention that New Jersey tax regulations automatically subject a corporation to tax if it obtains a certificate of authority from the Secretary of State. Their position appears to be that appellant would be subject to taxation anyway on the ground that it does business in the state. This position overlooks the fact that the New Jersey tax is levied "for the privilege of doing business" (N. J. Rev. Stat. 54:10A-2) and therefore, as applied to interstate business, is under the ban of the *Spector* case. It is clear on the face of the New Jersey tax regulations that if appellant, by qualifying, becomes the holder of a certificate of authority it can then be met with the claim that, whatever might otherwise have been its taxable status, it has provided New Jersey a basis for taxation. What disposition would be made of that claim is not a matter to be settled here; but there can be little doubt that, at the very least, qualification would face foreign corporations such as appellant with the prospect of long and expensive tax litigation in itself burdensome to interstate commerce.

Thus, even on the test contended for by the appellees, namely a "balancing" of the state's need for the statute against the burden on interstate commerce, the qualification statute is unconstitutional since the statute does burden

interstate commerce without serving any real state need. But appellees are mistaken in their contention that this is the test of constitutionality here. As shown in appellant's main brief, when a state seeks to impose a regulation on the very right to engage in interstate commerce it is acting outside its constitutional province and no "balancing of interests" is involved.

Conclusion.

Since appellant is engaged solely in interstate commerce, and since there is neither reason nor authority for permitting the state to condition appellant's right to carry on that commerce or to sue in its courts, the decision below should be reversed.

Respectfully submitted,

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March 1961.